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No. 86-1165

In the Supreme Court of the United States

OCTOBER TERM, 1986

SARAH M. GOOSTREE,
Petitioner,

vs.

MONTGOMERY COUNTY QUARTERLY COURT, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF THE CASE

Petitioner filed her lawsuit pursuant to 42 U.S.C. §1983 and 1985(3) *inter alia,* claiming that she had been discriminated against due to her sex by the refusal of the Montgomery County Quarterly Court Nursing Home Committee to select her as the Administrator of the Montgomery County Nursing Home. The Nursing Home Committee was composed of two males and one female, all of whom were elected officials of Montgomery County, Tennessee. Ms. Lorenza Collier, the female member of the Committee, was not simply dismissed by the District Court from the case but was dismissed at the request of Plaintiff on the morning of the trial, leaving the two male members of the Committee as Defendants.

At the request of Plaintiff, the trial was held before a jury, pursuant to 42 U.S.C. §1983. Two days prior to trial, Plaintiff amended her Complaint to add a claim that Defendants violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), et seq. by discriminating against her due to her sex. The jury trial lasted fifteen days and, at its conclusion, the jury returned a general verdict in favor of Defendants, in effect finding that Plaintiff was not discriminated against due to her sex. Since Plaintiff was not entitled to a trial by jury on her Title VII claim, that issue was reserved for the Trial Judge, who concluded that Plaintiff had failed to prove pretext and had failed to show intentional gender based discrimination in the Defendants' failure to select her for the Nursing Home administrator position.

The case was appealed to the United States Court of Appeals For the Sixth Circuit which noted that the evidence in the case was conflicting and subject to variable interpretations but that it could not say that the District

Court clearly erred in finding that the Defendants did not act with the statutorily prohibited animus in rejecting Petitioner for the job. The particular matters about which Petitioner complained in the selection process were numerous. The resolution of these matters involved the credibility of witnesses, which both the jury and the Trial Judge resolved in favor of Defendants.

Mr. Raymond Jarrell, the retiring Administrator, had been Administrator of the Home since it was formed in the late 1950s. He had responsibility for all of the employees at the Home, including the hiring and firing, but he had no responsibility for the selection of his replacement. The position of Assistant Administrator was created in 1975 in order to assist Mr. Jarrell in carrying out the duties of the Administrator, due to the rising demands of the job. At one point, Mr. Jarrell offered this Assistant Administrator position to Mary Woodall, a registered nurse, the nurse consultant at the Home, and also a female. She declined the job.

While there was testimony that Mr. Jarrell had made statements about the Administrator position being "a man's job", this testimony was seriously disputed. Mr. Jarrell had no authority or responsibility for hiring the Administrator so the statement had limited relevance. He denied ever having made such a statement and he actually offered the Assistant Administrator position to a woman. The testimony was offered by Mrs. Goostree and a male Assistant Administrator who was terminated. Both of these individual's credibility was called into question. Petitioner told the Committee in her interview that she had never been terminated from any job and she also testified on the witness stand that she had never been terminated from a job. Rebuttal testimony was presented in which her

supervisors at every nursing home position which she had held testified that they had terminated her for various reasons, all reflecting on her competency and ability. She had never held a nursing home position from which she was not terminated.

There was substantial and material evidence that the guidelines were not tailored for Mr. VanMeter and that the Committee was looking for the most qualified candidate for the opening. There was substantial and material evidence that Mr. VanMeter was not preselected for the position and that the sex of the applicant was not a factor in the Committee's decision. The guidelines for the Administrator position were definitely job related and, indeed, were job specific. There was substantial and material evidence that Mr. VanMeter was the most qualified applicant and members of the Committee testified why they deemed Mr. VanMeter the most qualified. The jury found for Defendants on December 23, 1980 and the District Court found for Defendants on Plaintiff's Title VII claim on May 31, 1984.

The Sixth Circuit Court of Appeals affirmed the District Court as to the discrimination issues because the findings were not clearly erroneous, their resolution involved matters of credibility and because there was little evidence from which to conclude that sex was a basis for any preferential treatment.

REASONS WRIT OF CERTIORARI SHOULD BE DENIED

There are none of the reasons present in the instant case which constitute the type or character of reasons that generally are considered in granting a writ of certiorari. The instant case primarily involves the resolution of factual issues and, most definitely, determinations regarding the credibility of witnesses. Both the jury and the Trial Judge found that Plaintiff had failed to show intentional, sex based discrimination in Defendants' failure to select her for the Administrator position.

The United States Court of Appeals for the Sixth Circuit saw no reason to disturb those findings and in so doing, this decision of the Court of Appeals is not in conflict with the decision of any other Federal Court of Appeals on the same matter, nor is it a departure from the accepted and usual course of judicial proceedings. Further, the issues raised in this case and in this Petition do not involve important questions of federal law which should be settled by this Court, nor does the case involve an important federal question that has been decided in a way which conflicts with applicable decisions of this Court. Therefore, Respondents respectfully urge that the writ of certiorari be denied.

The issues involved herein primarily were factual ones and there was substantial and material evidence from which the jury and the Trial Judge could determine that Plaintiff was not discriminated against due to her sex. Plaintiff's pretext argument was forcefully presented to the jury and to the Trial Judge. The conclusion reached by both triers of fact was that sex was not the basis for any preferential treatment.

I. The Question of "Pretext" Is a Fact Question Resolved in Respondents' Favor by Both the Jury and the Trial Judge.

The Montgomery County Nursing Home is an indigent care nursing home located in a rural area in Montgomery County, Tennessee. It is owned and operated by Montgomery County through its elected representatives, including, at all relevant times herein, the County Judge, William O. Beach, and the Montgomery County Quarterly Court which, in 1978, was renamed the Montgomery County Board of County Commissioners. Three members of the Quarterly Court constituted a Nursing Home Committee which was responsible for the nursing home and, at all relevant times herein, that Committee was composed of Chairman Arthur Hunt, an elderly vocational guidance counsellor who had been employed at a local high school for 27 years, Mrs. Lorenza Collier, a black housewife, and Mercer McKinney, the owner and operator of a local flower shop. Sixty of the sixty-five employees at the home were female and ten of the thirteen supervisory employees were female.

In 1975, Mr. Raymond Jarrell, who had been the Administrator of the nursing home for approximately twenty years, obtained permission to hire an Assistant Administrator in order to help him with the increasing workload, primarily brought about by the increased paperwork required due to government regulations. Mr. Jarrell hired a male as the first Assistant Administrator but this person resigned after approximately one year to accept another opportunity. Mr. Jarrell then offered the position of Assistant Administrator to Mrs. Mary Woodall, the nurse consultant at the home and a female. She refused the position and another male was hired. Although, this in-

dividual had a Nursing Home Administrator's license he simply could not handle the position and was terminated. Mr. VanMeter was hired as the Assistant Administrator by Mr. Jarrell in August, 1976.

Mr. Jarrell was the one whom Petitioner, the terminated Assistant Administrator and a third individual whom Mr. Jarrell did not even recall talking with except in an interview for the Assistant Administrator position, accused of having made statements that it was "a man's job." Mr. Jarrell denied ever making that statement. He had no responsibility for selecting the Administrator of the Home. He had offered the Assistant Administrator position to a female. All of these facts were before the Court and the jury and the credibility of the witnesses as well as the weight of the testimony was in issue. Petitioner had told the Committee in her interview that she had never been asked to resign from a job and she so testified on the witness stand. Rebuttal testimony was presented by Petitioner's two supervisors at all of her prior nursing home positions who testified that they had terminated her for various reasons, all reflecting on her competency and ability. She had never held a nursing home position from which she was not terminated.

The Trial Judge did not permit much of this rebuttal testimony to be heard by the jury, since the Committee was not aware of these facts before they made their selection. There was substantial, credible testimony, however, from the Committee members as well as from Judge Beach and the director of personnel for the County, both of whom attended the final interviews, that Petitioner's responses to the interview questions, which were asked of all candidates, were not nearly as specific as other candidates and that she did not demonstrate in her interview

the knowledge, ability or qualifications that was demonstrated by Mr. VanMeter, or other candidates, for that matter.

Mr. Jarrell had planned to retire in the summer of 1978 but, due to his failing health, submitted his resignation letter to Judge William O. Beach on June 30, 1977. The Nursing Home Committee began the process of hiring a replacement for Mr. Jarrell. The Committee formulated its own guidelines or qualifications for the position, although there were two other job descriptions in existence. This became the focal point for argument on behalf of Petitioner that the guidelines were formulated and tailored to fit Mr. VanMeter resulting in his preselection for the position.

Petitioner argued that the Committee revised the guidelines previously prepared by Mr. Jarrell which read, *inter alia*, "Must fulfill license requirement of this State", to read, "Possess or be in the process of obtaining a nursing home administrator license from the State of Tennessee". Neither VanMeter nor Petitioner held a Tennessee Nursing Home Administrator's License at the time these guidelines were drafted, nor at the time they applied for the position, although Petitioner was entitled to receive a Tennessee license by virtue of reciprocity. Mr. VanMeter, who was caught by surprise with Mr. Jarrell's early retirement announcement, was not able to take the nursing home administrator test prior to the interview or selection, since it was not even offered until late September, or after the selection was made. The Committee's explanation for this guideline was that it would encourage persons from out of state, like Petitioner, as well as persons like VanMeter to apply. Montgomery County, of which Clarksville is the County Seat, is located next to the State of Kentucky.

Petitioner also argued that the guideline drafted by the Committee requiring a candidate to possess or be in the process of obtaining a Water and Waste Water License from the State of Tennessee was tailored to fit Mr. VanMeter, since she did not have the experience. There was considerable and substantial evidence from which the triers of fact could conclude that a Water and Waste Water License was most desirable and would result in significant savings to the nursing home and, in fact, Mr. Jarrell held that particular license. Petitioner argued that there was a one year waiting requirement in order to obtain that license and, therefore, Mr. VanMeter was the only one who could realistically benefit from that requirement. The Committee all testified that they were not aware of the one year waiting requirement and that they assumed Mrs. Goostree could obtain this license as easily as any other applicant, that she was deemed to have satisfactorily met this particular guideline and it resulted in no favoritism to any candidate. There certainly was no evidence that males could obtain this license any more quickly or easily than could females. In fact, the female Administrator of a similar nursing home in an adjoining county testified that she held that license for her nursing home. Further, the waiting requirement could be waived.

Petitioner also argued that the maintenance and security guidelines drafted by the Committee indicated preferential treatment to males. This was a fact question and there was substantial evidence to support both the jury's and the Trial Court's determination that these particular guidelines were not intended to, nor did they result in, preferential treatment to males. For instance, Mr. Jarrell was elderly and in failing health and performed virtually none of the maintenance, nor was he able to "stand guard over" the nursing home. The Committee

explained that they were looking for someone who could see that the maintenance and security were accomplished. There were two maintenance men employed at the facility plus the major maintenance was performed by outside contractors. There had been security problems at the facility, primarily patients wandering off into the nearby woods, and there was substantial evidence that security was important. These guidelines were both job related and job specific.

Petitioner's initial contention was that the Committee should have used one of the two existing guidelines and should not have prepared its own. Actually, they all were quite similar. Petitioner contended that the Committee should have used a job description which had been prepared by Mr. Michael Lutche, who had been employed by the State of Tennessee Personnel Department in the office of Local Classification and Compensation Services. Petitioner called Mr. Lutche as a witness but, on cross examination, he testified that, based upon the information available to the Committee, Petitioner did not meet the qualifications set forth in his guidelines. Mr. Lutche also testified that, except for the license, Mr. VanMeter met all of the objective qualifications. Mrs. Goostree was lacking in education and experience whereas Mr. VanMeter only was lacking his license and he was scheduled to take the test as soon as it was offered by the State.

Mr. VanMeter had done a most commendable job during his approximately one year as Assistant Adminstrator. He acquired the love and respect of the patients and the staff. Thus, when Mr. Jarrell announced his retirement and the Committee began looking for another Administrator, Mr. VanMeter had the support of the Nursing Home staff, patients, and physician, as well as Mr. Jar-

rell. Letters of recommendation were written on his behalf by the Nurse Consultant at the Home, the physician of the Nursing Home, the pharmacist and the Administrator, Mr. Jarrell. A logical conclusion, but not the only conclusion, from all of this evidence is that Mr. VanMeter had the "inside track" for the position because he was a known quantity who was doing an excellent job as Assistant Administrator and who had demonstrated potential and ability with regard to performing the job of Administrator. It had nothing to do with his sex.

Plaintiff argued that the selection of a former Sergeant Major in the Army to be the Nursing Home Administrator is, in itself, an indication of sex discrimination. Plaintiff, however, in so doing engages in a bit of sexual stereotyping herself. This particular Sergeant Major was extremely competent in handling the administrative duties and in supervising the personnel and was very much loved and admired by the patients. To the contrary, Plaintiff had been fired from every Nursing Home position she had ever held for various reasons, one of which was the inability to get along with the patients or their families. Plaintiff argued that the job guidelines, as developed by the Committee, were tailored to fit Mr. VanMeter. There was substantial, material evidence from which the jury and the Trial Judge could determine that either the guidelines were not tailored to fit Mr. VanMeter or, that the guidelines did not have an impact, disparate or otherwise, on Petitioner.

The guideline pertaining to the requirement for a Nursing Home license, when the guideline was adopted, benefited Ms. Goostree as much as it did Mr. VanMeter, because she did not have her Tennessee license either. The jury and the Trial Judge had the opportunity to observe the cred-

ibility and demeanor of the Committee as they explained each guideline, the reasons therefor and their interpretation thereof. The waste water license guideline also favored neither males nor females. The Committee knew that the Nursing Home was able to save money because Mr. Jarrell held the waste water license required by the State of Tennessee. If no one held the license, an outside contractor had to be hired. The Committee did not know what the specific requirements of the license were; the Committee was merely stating to the applicants that, if they did not have this license, they should be in the process of obtaining it. Neither Mr. VanMeter nor Ms. Goostree had this license and it was no more difficult for a female than for a male to get.

The guidelines simply were not designed to favor any male applicant over a female applicant. They were not sex related and they certainly were job specific. A conclusion that could be reached is that the guidelines were drafted with Mr. VanMeter in mind in order to favor his selection as the Administrator, not because he was male, but because he had performed so well as the Assistant Administrator. The conclusion also could be reached that the guidelines were drafted by the Committee without regard to sex as part of what they saw to be their responsibility and that the guidelines were their effort to set forth in terms which they understood the qualifications they were looking for in the new Administrator. Members of the Committee testified that the waste water license requirement, the maintenance requirement and the security requirement did not cause Ms. Goostree unfavorable consideration in the final analysis. The Committee members assumed that she could supervise the maintenance chores, that she could supervise the security of the Home and that she could obtain a waste water license.

In short, there was evidence of preselection and there was evidence of no preselection. The evidence of preselection is not nearly as clear as Plaintiff or the Sixth Circuit Court of Appeals seems to suggest. As the Sixth Circuit noted, however, regardless of the question of preselection, there was virtually no evidence that any preselection that occurred was the result of sex discrimination or that the Committee favored Mr. VanMeter because he was a male. There was substantial, material evidence, that the Committee favored Mr. VanMeter because of his qualifications.

In a recent sex discrimination case, this Court held that, if the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. If there are two permissible views of the evidence, the fact finder's choice cannot be clearly erroneous. *Anderson v. City of Bessemer*, 470 U.S. ....., 106 S. Ct. ....., 84 L.Ed.2d 518, 528 (1985). In its review of the instant case, the Sixth Circuit Court of Appeals did not even suggest that it would have weighed the evidence differently and it is submitted that any individual(s) who sat as fact finder at the trial of this cause would have reached the same conclusion as the jury and the Trial Judge. The evidence cried out for only one conclusion to those who had the opportunity to both see and hear it presented.

This Court stated in *Anderson*:

> "The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The

> trial judge's major role is the determination of fact, and with the experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost and diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be the 'main event' . . . rather than a 'tryout on the road.' "

Anderson, supra, 84 L.Ed.2d at 529.

It is submitted that the question of whether an employer's explanation is pretextual or not is a question of fact and, although there may certainly exist situations where there is only one permissible view of the evidence, the instant case is not such a case. The factual inquiry in a Title VII case is whether the defendant intentionally discriminated against the plaintiff. *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715, 103 S. Ct. 1478, 75 L.Ed.2d 403, 410 (1983); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L.Ed.2d 207, 215 (1981). The plaintiff retains the burden of persuasion.

In the instant case, Respondents produced evidence that Mr. VanMeter was selected instead of Petitioner for legitimate nondiscriminatory reasons. Petitioner had the opportunity to demonstrate that Respondents' proffered reasons were not the true reasons for her rejection. Petitioner had the opportunity to persuade the jury and the

Court that a discriminatory reason more likely motivated the Committee or that the Committee's proffered explanation was unworthy of credence. *See, Burdine, supra,* 450 U.S. at 255-256. In short, the Trial Judge, and the jury in this case, had to decide which party's explanation of the Committee's motivation it believed and both selected the Committee's version. *See, U.S. Postal Service Board of Governors v. Aikens, supra,* 460 U.S. at 716.

It is also submitted that the Sixth Circuit's suggestion that the evidence clearly suggests that preselection occurred is a permissible view of the evidence that is most definitely not the only permissible view of the evidence. There was substantial and material evidence that the Committee, Judge Beach and Mike Allen considered the qualifications and the experience of each applicant, without regard to sex, prior to reaching its decision and that Mr. VanMeter was found to be the most qualified without any preselection. Further, if preselection means that a candidate who is known and respected is favored over another candidate whose credentials or qualifications are not as well known, then preselection is a widely utilized practice that does not violate Title VII, provided there is no illegal discriminatory animus.

Petitioner had virtually no work experience prior to the work as a nursing home administrator which she listed on her application. The Committee noted that she had worked in several different Homes over a period of approximately two-and-one-half years which indicated that she had no lengthy experience in any one Home. The Committee noted that she worked in corporate nursing homes which indicated to the Committee that she had limited experience and skill in the administrative areas of managing a nursing home because these particular functions are handled at the corporate level by corporate

owned Homes. This was in contrast with Montgomery County Nursing Home where the Administrator had responsibility for everything, including preparing the budget, complying with governmental regulations, preparing governmental reports, and other administrative, as well as operational, areas in which Petitioner obviously had very little experience and skill. The Committee noted that Mr. VanMeter had extensive experience in personnel supervision and administrative matters including reports and budgets and that Mr. VanMeter had worked as an Assistant Administrator for approximately one year under Mr. Jarrell in preparing the budget, reports and all other matters. The Committee also noted that Mr. VanMeter had the respect of the staff and had demonstrated a very caring and loving attitude and concern for the patients.

It is submitted that the Committee's explanation for their reasons for selecting Mr. VanMeter were not pretextual and it is most definitely submitted that Mrs. Goostree's qualifications were not better than those of Mr. VanMeter. Regardless of one's conclusions with regard to those assertions, these are factual matters which were best resolved by the Trial Court and the jury.

The Trial Court was well aware that Plaintiff did not need to show direct evidence of discrimination in order to prove her claim and the jury was so instructed. The Trial Court rendered its judgment on the jury verdict in the 42 U.S.C. §1983 claim and, after a lengthy period of time, the parties submitted their findings of fact and conclusions of law to the court. The findings and conclusions submitted by Respondents were not adopted verbatim and, indeed, much of Respondents' findings and conclusions were omitted or revised. The question of "pretext" or whether Respondents' explanation of its actions was pretextual is a question of fact for the jury and the Trial Court, both

of whom resolved the question in Respondents' favor. It is neither clearly erroneous nor should it be treated as a matter of law.

II. The Causation Standard Was Properly Applied.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et seq., makes it an unlawful employment practice for an employer to discriminate against any individual "because of" such individual's sex. 42 U.S.C. 2000(e)-2. This Court previously has stated that no more is required to be shown by a plaintiff than that the illegal discriminatory animus is a "but for" cause. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n. 10, 96 S. Ct. 2574, 49 L.Ed.2d 493 (1976). Therefore, if plaintiff cannot show that any illegal animus is a "but for" cause, then Respondents' selection is lawful.

Further, both the Trial Court and the Court of Appeals certainly understood that sex does not have to be the sole reason for Petitioner's rejection. The Trial Court's charge to the jury included both those instructions set forth in the Sixth Circuit Court of Appeals' Opinion and other instructions and the instructions did not have any tendency to confuse or mislead the jury with respect to the applicable principles of law. Further, the instructions indicate that the Trial Court fully understood that sex did not have to be the sole reason for the rejection.

As the Sixth Circuit noted, Petitioner has never suggested, prior to now, that this is a dual motive case or a case in which direct evidence of discrimination is available. Petitioner's dual or mixed motive argument is being raised for the first time in her Petition to this Court. In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977),

this Court addressed the dual motive situation in a first amendment case. This Court held that the initial burden of proof was on the Plaintiff to show that his conduct was protected and that the protected conduct was a substantial or motivating factor in the decision not to rehire him. Once the Plaintiff establishes that the protected conduct was a motivating factor in the employer's decision, the burden of persuasion shifts to the employer to demonstrate that Plaintiff would not have been hired regardless of the protected conduct. This Court observed that a Plaintiff should not be placed in a more favorable position than he would have occupied without the protected conduct.

In addition to the fact that Petitioner raises this argument for the first time in this Court, Petitioner was unable to carry her burden of establishing that sex was a "but for" factor in the decision. Petitioner's approach would require Respondents to assume the burden of proof and persuasion to show that they would have made the same decision absent sex discrimination, when they have already proved that sex discrimination was absent, anyway. If Petitioner had been successful in her efforts to prove that, but for sex discrimination, she would have been selected, Petitioner would have won her case regardless of the dual motive approach.

CONCLUSION

It is respectfully urged that the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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